UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES M. HUTCHISON, Appellant, v. U.S. POSTAL SERVICE, Agency.	DOCKET NUMBER SF075285A0956 DATE: OCT 26 1988

Richard P. Fox, Esquire, Fox and Gest, Los Angeles, California, for the appellant.

Nancy Hutt, Esquire, San Bruno, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of an addendum decision that denied an attorney fee award, based on findings that he was not the prevailing party and that an award was not warranted in the interest of justice. For the reasons set forth below, the Board GRANTS the petition under 5 U.S.C. § 7701(e), and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

The appellant petitioned for appeal of his removal from his position of Carrier for mistreatment of mail and threatening employees. While the case was pending before an administrative judge, the parties settled the matter, and a copy of the settlement agreement was submitted for inclusion in the record. The settlement agreement essentially provided that the notice of proposed removal and the letter of decision would be removed from the appellant's official personnel records upon his application for disability retirement to the Office of Personnel Management, and that, if he fully recovered from certain injuries, and if he applied for restoration within thirty days after cessation of his worker's compensation, he would receive priority consideration for restoration to his former position or an equivalent one. Appeal File, Tab 10. The administrative judge made the settlement agreement part of the record and dismissed the appeal.

The appellant then filed a motion for attorney fees. In his addendum decision, the administrative judge denied the motion, finding that the appellant had not won a significant part of the relief sought in his appeal, and that he therefore had failed to show he was the prevailing party. He further found that the appellant had failed to meet his burden of showing that an award was warranted in the interest of justice under 5 U.S.C. § 7701(g)(1).

ISSUES

1. Did the administrative judge correctly determine that the appellant was not a prevailing party?

2. Did the administrative judge correctly determine that a fee award was not warranted in the interest of justice?

ANALYSIS

The administrative judge erred in determining that the appellant was not a prevailing party.

In order to establish that he is eligible and entitled to an award of attorney fees, the appellant must show that he is the prevailing party; that he incurred attorney fees; and that the amount of fees claimed is reasonable. *See* 5 U.S.C. § 7701(g)(1); *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980). To be considered a prevailing party within the meaning of section 7701(g)(1), an appellant must have obtained all, or a significant portion of, the relief sought in petitioning for appeal as a result of the institution of the appeal. *See Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980); *Allen*, 2 M.S.P.R. at 427 (1980). *See also Sterner v. Department of the Army*, 711 F. 2d 1563, 1566-67 (Fed. Cir. 1983).

In his appeal of his removal for misconduct, the appellant sought rescission of the removal action; in the alternative, he wanted the removal penalty reduced. *See* Appeal File, Tab 1, Petition for Appeal. As a result of the settlement agreement, the appellant gained cancellation of the

removal on the condition that he apply for disability retirement, and priority consideration for restoration to duty should he recover from his medical condition.

Having avoided the agency's intended removal action, and having gained an opportunity to receive priority consideration for restoration to duty, the appellant obtained a significant part of the relief he sought. He therefore must be considered to have prevailed. *See Boese v. Department of the Air Force*, 784 F.2d 388, 390 (Fed. Cir. 1986); *Sterner*, 711 F.2d at 1566-68; *Miller v. Department of Health and Human Services*, 21 M.S.P.R. 341, 344 (1984); *Hodnick*, 4 M.S.P.R. at 375.

2. The administrative judge correctly determined that a fee award is not warranted in the interest of justice.

Attorney fees are not automatically granted to an appellant merely because he or she is the prevailing party. While the appellant's relative degree of success may be considered in determining whether a fee award is warranted in the interest of justice, it is not dispositive, and all other relevant considerations must be factored into the determination of the interest of justice. *See Ingram v. Veterans Administration*, 29 M.S.P.R. 641, 646 (1986).

In *Allen*, 2 M.S.P.R. at 434-35, the Board developed a set of five categories of situations where attorney fees may be warranted in the interest of justice: (1) Where the agency engaged in a prohibited personnel practice; (2) where the agency's action was clearly without merit or was wholly

unfounded or the employee is substantially innocent of the charges brought by the agency; (3) where the agency initiated the action against the employee in bad faith; (4) where the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; and (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

In his motion for attorney fees, the appellant asserted that fees were warranted in the interest of justice on the grounds that the agency's actions were precipitous, arbitrary, and capricious, and, basically, that the two charges upon which the removal action was predicated were untrue. We agree, however, with the administrative judge that appellant's bare assertions do not meet his burden of establishing entitlement to an award of fees. *See* Addendum Decision at 4.

It is not readily apparent on the face of the limited record before the Board that the appellant's removal was clearly without merit, that it was wholly unfounded, or that the appellant was substantially innnocent, particularly since he admitted, with regard to the charge of mistreatment of mail, that he probably accidentally placed the two first-class, deliverable letters at issue in the case in his locker. *See* Adverse Action File, Tab 1 (Appellant's Reply to Notice of Proposed Removal).* Furthermore, as the administrative judge

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* The clearly without merit category focuses on the result of the case before the Board, not on the evidence and information available to the agency prior to the hearing. *Yorkshire v. Merit Systems Protection Board*, 746 F.2d 1454, 1457 (Fed. Cir. 1984).

correctly found, the appellant's allegations that the charges are untrue are insufficient to show that the agency knew or should have known that the charges could not be sustained. Finally, we note that the agency is not alleged to have engaged in a prohibited personnel practice, and there appears to be no evidence that the agency action was brought in bad faith or that the agency committed gross procedural error.

This is the final decision of the Merit Systems Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

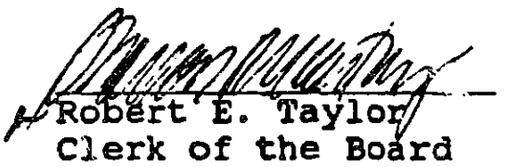
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.